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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

93-107

In re Applications of	)	MM Docket No. 93-107
	)	
DAVID A. RINGER	)	File No. BPH-911230MA
	)	
ASF BROADCASTING CORPORATION	)	File No. BPH-911230MB
	)	
WILBURN INDUSTRIES, INC.	)	File No. BPH-911230MC
	)	
SHELLEE F. DAVIS	)	File No. BPH-911231MA
	)	
OHIO RADIO ASSOCIATES, INC.	)	File No. BPH-911231MC
	)	

For Construction Permit
For New FM Radio Station at
Westerville, Ohio

To: Administrative Law Judge
Walter C. Miller

REPLY TO
PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

WILBURN INDUSTRIES, INC.

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November 4, 1993

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ARGUMENT

I. Wilburn's Integration Credit

In its direct written case and throughout the cross-examination of its principals at hearing, Wilburn Industries, Inc. ("Wilburn") established that it must receive credit for the full-time integration of Charles Wilburn, who holds 100% of Wilburn's voting stock, into the day-to-day management of its broadcast station. The proposed findings of Ohio Radio Associates, Inc. ("ORA"), ASF Broadcasting Corp. ("ASF") and David A. Ringer ("Ringer") contend that such credit is unwarranted, but the record shows that such arguments are frivolous.

ORA argues that Charles Wilburn does not deserve any integration credit because he intends to retire in April, 1994, when he reaches age 65. This intent to retire is further shown, ORA suggests, by the "significant" role which Nelson Embry would have at the station and by Mr. Wilburn's lack of broadcast experience. According to ORA, Wilburn's integration proposal also is "inherently incredible", because: (a) he says he will give his portion of their existing law practice to his son for no consideration; (b) Charles Wilburn nevertheless will continue to pay one-half of the rent for the firm's office space; (c) he will initially receive no salary from either the law firm or the station; and (d) there is no record evidence that his wife has agreed to this arrangement. This plan also is inherently incredible, ORA urges, because (e) Bernard Wilburn would have to

work an 80-hour week or hire another attorney when his father leaves the firm, (f) Bernard has yet to take any steps to hire such other attorney, and (g) Charles was vague when he testified about retiring from the practice of law and admitted that he would continue to advise his son about the firm's cases. Finally, ORA argues that Bernard Wilburn, the applicant's non-voting shareholder, executed a submission to the State of Ohio as Wilburn's Corporate Secretary, that the State was never notified that Bernard no longer is Secretary, and that Bernard has conceded that the 50% equity interest which Charles Wilburn has in their corporation gives Charles only "negative control" of the applicant.

These arguments by ORA either affirmatively misrepresent the record evidence or depend on speculation which has no nexus at all with the evidence adduced at hearing. Thus, Charles Wilburn did not testify that he has intended to retire from all business activities when he reaches age 65. Rather, he consistently testified that he intends to retire from the practice of law and find some other, new activity to occupy his time and energy. (Tr. 331-332, 340, 345.) Thirty years of law is enough, he explained, and he no longer needs the income from the practice (or a radio station) to support himself. (Tr. 319, 322.) Further, Charles Wilburn has not arranged for Nelson Embry to have a significant, managerial role at the station. At most, there have been some general discussions (which have not included

such basic matters as the hours to be worked and compensation to be paid) about his being retained as a consultant-advisor who may thereby provide advice to Mr. Wilburn based on Embry's years of experience. (Tr. 311, 313-361.) Contrary to ORA's strained theory, these discussions of possible assistance do not mean that Embry will manage the station or that Wilburn will be incapable of himself overseeing the day-to-day activities of his business.[1]

It also is not "incredible" that Mr. Wilburn will leave his position at the firm without requiring his son to pay him for his one-half of the business. Aside from the fact that this would not be remarkable where a father and son are concerned, this also was the way the elder Wilburn obtained the practice when his former partner retired. (Tr. 316.) Further, Charles Wilburn will not continue to pay one-half of the law firm's rent; he will receive one half of such rent as part owner of the building where the firm is located. (Tr. 289, 319, 336.) ORA's remarkable suggestion that Mr. Wilburn needs his wife's permission before he retires from the practice of law is unsupported by the record and finds no basis in Commission precedent.

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[1] As the Commission recognizes, there is nothing about the operations of a broadcast station which cannot be learned by a new owner. This would be particularly true in the case of Mr. Wilburn, who has supervised the operation of retail businesses pursuant to powers of attorney given by clients. (Tr. 309-310.)

ORA'S additional contentions are equally vacuous. If Bernard may have to work "sweatshop" hours for a limited period of time once his father leaves the practice and until he hires another attorney, there is no evidence that he cannot do so -- nor is there any evidence or indication that Charles Wilburn will give up his own plans (and ignore his representations to the Commission) if it appears that Bernard Wilburn may not be able to keep all of the clients for which his father formerly did legal work. In any event, Charles Wilburn testified that it would take about 90 days for him to withdraw from the practice, and there are a number of other attorneys whom Bernard could readily employ to take over some of the workload. (Tr. 317, 344.)[2] Charles Wilburn also may provide advice to his son when asked, on an occasional informal basis when his opinion is requested, but this will not require his in-depth involvement in a case, and he will not work at the firm's offices, appear as co-counsel or otherwise devote any material amount of time to such matters. (Tr. 336-337.)

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[2] As ORA surely knows, it would be grossly premature for Bernard Wilburn to seek such employees at this point. ORA also fails to recognize that Charles Wilburn's caseload can be significantly reduced within that 90-day period (Tr. 350-351) and -- most importantly -- that Charles will eventually discontinue his active practice and leave the firm to his son in any event. To suggest that this cannot be done is to (1) ignore what occurred when Charles Wilburn himself acquired sole possession of the practice when his partner retired and (2) assume that Charles Wilburn is immortal.

Finally, as Charles Wilburn clearly explained at hearing, Bernard Wilburn executed the notice to the State of Ohio in his capacity of Secretary of a corporation which was changing its status to one where he would hold no office or voting stock. (Tr. 327.) Thereafter, he held no corporate office and had no role in the conduct of the company business, while all subsequent filings with the State included no reference to any such position or activity on his part. (Tr. 327.) Bernard Wilburn also did not "concede" or otherwise indicate that his own 50% equity interest in the company limited the control exercised by his father. To the contrary, reference to the transcript cited by ORA plainly reveals that, in responding to a question about his own stock, he explained that, "It [Bernard's equity] is as much as his [Charles's equity]. It [Bernard's equity] does not control what happens." (Tr. 361.)

Thus, ORA's strained, specious and speculative contentions do nothing to impeach the clear and convincing testimony provided by Charles and Bernard Wilburn. They merely demonstrate that evidence, law or common sense will not limit what ORA may advance in its arguments.

While ORA may distort the evidence, ASF and Ringer rely on no evidence at all when they challenge the integrity of Wilburn's testimony. Rather, they merely urge the Judge to conclude that it is "unlikely" that someone would choose to retire from the

practice of law in order to undertake a new career (ASF and Ringer), that "reality" requires the conclusion that Charles Wilburn will not manage the station and only "look over the shoulder" of whoever is hired to be manager (ASF), that Bernard cannot be trusted not to interfere with station operations as long as he is "on the hook" for one-half of its expenses (ASF), and that it will prove impossible for Charles Wilburn to "divorce" himself from his successful law practice and resist the "temptation" to continue as the "heart and soul" of his current business (Ringer).

In short, ASF and Ringer point to no evidence which impeaches the integration proposal of Charles Wilburn. Instead, they merely argue that his sworn testimony should not be believed, although there is nothing inherently incredible about someone choosing to occupy himself in another vocation (or avocation) after he no longer wishes or needs to engage in the practice of law.

II. Ringer's Integration Credit

A review of Ringer's own claims for integration credit, as set forth in his proposed Findings of Fact and Conclusions of Law ("Findings") reveals that, at this point, no credence can be given to his proposal. It is now clear that he will say whatever he deems necessary to obtain unwarranted comparative credit, even

where such claims are untrue. The initial evidence of this reckless disregard for the truth was revealed at hearing, where he claimed to reside within the service area of his proposed station prior to the time that he filed his application, but later conceded that he did not actually so reside. While that misstatement, standing alone, may not have rendered his integration proposal unworthy of credit, Ringer has since done far more to impeach his own credibility. He claimed credit for civic activities in his direct written testimony, revealed in the course of his cross examination that such activities did not take place within his service area (because he did not reside in such area), and still claimed such credit in his submission to the Judge. Similarly, he claimed credit for significant broadcast experience (including managerial experience and experience after 1972) in his direct written testimony, revealed in cross examination that he does not have such experience, and still claimed such credit in his submission to the Judge. In addition, he claims that he will install emergency generators although his proposed budget revealed that he never planned to acquire such equipment; he claims that he will withdraw from his existing full-time business without explaining how he will do so; and he has represented that he would sell his shares in an existing station to his fellow shareholders before even discussing the matter with them.[3]

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[3] He also states that he will be relieved of all obligations to the bank whose loan to the station he (continued...)

In view of Ringer's repeated, continuing misstatements -- extending to the recent submission of his Findings to the Judge -- it must be concluded that none of his claims can be trusted. In these circumstances, it is not necessary to conclude that he has engaged in disqualifying misrepresentations: He nevertheless may be denied comparative credit on the grounds that he has provided ample proof that his claims relating to his proposed integration cannot be credited.

III. Comparative Coverage

The submissions of the other parties have weighed the technical proposals advanced by the applicants herein and have recommended various degrees of comparative preference based thereon. It will suffice, however, to recognize that: (a) the comparative weight of any preference for coverage is minimal, given the plethora of existing services in the market; and (b) such slight preferences do not counterbalance a clear superiority under the integration criterion when "best practicable service" as a whole is determined. Accordingly, where Wilburn's integration proposal is superior to those of each of its opponents, whatever greater coverage they may propose at this point is of no decisional significance.

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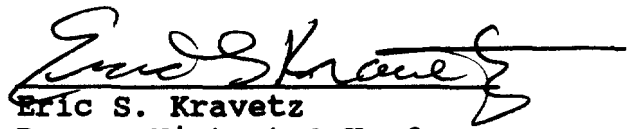
[3](...continued)
has guaranteed. He assumes this, however, while providing no indication that the bank will release him from this obligation, or that he even has discussed the matter with the bank.

IV. Conclusion

Wilburn has advanced a solid, credible integration proposal which on a quantitative basis is superior to those of the other applicants herein. The attacks on that proposal by some of those applicants are patently inadequate, while no other factor in the comparative analysis is of decisional significance. Accordingly, in light of the arguments presented by all of the parties, it must now be concluded that Wilburn's application must be granted.

Respectfully submitted

WILBURN INDUSTRIES, INC.

By: 

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Dated: November 4, 1993

CERTIFICATE OF SERVICE

I, Tracy A. Holden, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 4th day of November, 1993, I caused copies of the foregoing "Argument" to be delivered by first class mail, postage prepaid, to the person named below:

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